No. 47063-2-II

COURT OF APPEALS, DIVISION II,
FOR THE STATE OF WASHINGTON

SHERRY KING,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INS. CO., *et al.*,

Respondent.

BRIEF OF RESPONDENT
STATE FARM MUTUAL AUTOMOBILE INS. CO.

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I. INTRODUCTION

Appellant Sherry King suffered injuries in two motor vehicle accidents approximately one month apart in the spring of 2011. The first accident was a clear liability rear-end collision caused by an uninsured motorist. The second accident was a disputed liability collision between King and Dillon McCarten.

King filed an action for damages in Thurston County Superior Court in 2014 naming her insurance company, State Farm Mutual Automobile Insurance Company ("State Farm), and McCarten as defendants. King set the case for mandatory arbitration under Chapter 7.06 RCW and Mandatory Arbitration Rule ("MAR") 1.2. Following an arbitration in which all parties participated, the arbitrator entered awards against State Farm and McCarten. The arbitrator limited King's award against McCarten to $50,000, which is the maximum amount allowed in arbitration. The arbitrator indicated that he would have awarded more than $50,000 to King, but was bound to the jurisdictional limit established in the MARs. He imposed costs, but only against McCarten.

No one requested a trial *de novo* within 20 days of the arbitration award. When King failed to present a judgment on the arbitration award to the trial court for entry as the final judgment,

State Farm moved for its entry.[1] King and McCarten opposed State Farm's motion, claiming the court could not enter judgment against McCarten because they had settled their dispute and stipulated to its dismissal before the arbitrator filed his award. McCarten simultaneously moved to dismiss King's lawsuit based on the purported settlement.

The trial court, the Honorable Gary R. Tabor, granted State Farm's motion and entered a final judgment on the arbitration award. The court also entered a satisfaction of judgment as to the judgment against McCarten based on the settlement between King and McCarten. The court denied McCarten's motion to dismiss.

King now appeals the final judgment and the order denying McCarten's motion to dismiss. McCarten did not appeal.

Addressing the final judgment first, King's appeal of that order is improper where she failed to seek review of the arbitration award by requesting a trial *de novo* following entry of the arbitrator's award. Because the judgment entered on the arbitration award is not appealable, this Court must dismiss her appeal from that order.

Turning to the order denying McCarten's motion to dismiss, King ignores controlling case law interpreting CR 41 in the

[1] State Farm moved the trial court to enter the final judgment or, alternatively, to compel King to present the judgment for entry. CP 45.

arbitration context. King offers nothing to overcome the basic legal proposition that she cannot stipulate to the dismissal of her claims against McCarten as a matter of right to escape an arbitration award. It follows that neither can McCarten. Both parties participated in the arbitration process and should be bound by its results.

This Court should affirm the trial court in all respects. It should also award State Farm its statutory attorney fees and costs on appeal pursuant to RAP 14.2.

II. COUNTERSTATEMENT OF THE ISSUES

State Farm acknowledges King's assignments of error, but believes the issues associated with those errors are more appropriately formulated as follows:

1. Is an appeal from a final judgment entered on an arbitration award subject to dismissal where it is not subject to appellate review because no party sought a trial *de novo* as the arbitration rules require?

2. Did the trial court properly enter a final judgment on an arbitration award where no party sought a trial *de novo*, assuming without agreeing that appellate review is appropriate?

3. Did the trial court properly deny a motion to dismiss where the parties arbitrated their dispute at the injured motorist's request, the arbitrator filed an arbitration award at the conclusion of that arbitration, and the trial court

entered judgment on that award when no party sought a trial *de novo*?

III. COUNTERSTATEMENT OF THE FACTS

King's introduction and statement of the case, while accurate, ignore or downplay the impact on her appeal of several significant facts.

For example, King acknowledges that she filed a lawsuit naming both McCarten and State Farm as defendants. Br. of Appellant at 4. She then attempts to distinguish her claims by asserting that the claim against State Farm did not include a UIM claim arising out of the accident with McCarten. Br. of Appellant at 4. But that is not what King alleged in her complaint. On the contrary, she alleged that the injuries she suffered in the two collisions could not be reasonably apportioned and that liability for her damages was therefore indivisible. CP 8. She maintained her position on joint and several liability during the arbitration. CP 40.

King then bemoans the $50,000 limits of McCarten's insurance coverage and self-servingly characterizes him as "substantially underinsured, given [her] damages from that collision." Br. of Appellant at 7, 11. But she refuses to acknowledge that McCarten fully compensated her for her damages. King affirmatively agreed her claims against McCarten

were worth no more than $50,000, exclusive of attorney fees and costs, when she set the case for mandatory arbitration. CP 62. She did not contend that her claims exceeded $50,000 and that she was waiving any claim in excess of that amount for purposes of arbitration. CP 62. Her complaint that McCarten was underinsured is unwarranted.

King next complains the arbitrator did not consider her future damages, whether general or special, when issuing the arbitration award. Br. of Appellant at 6. King statutorily limited her recovery when she voluntarily placed the case into mandatory arbitration. The arbitrator's hands were tied. He could not award more than $50,000, exclusive of attorney fees and costs, once the case was placed before him. MAR 1.2; RCW 7.06.

Finally, King makes only a passing reference to the fact that no party requested a trial *de novo* within 20 days of the arbitrator's award. Br. of Appellant at 7, 15. In doing so, she ignores the remaining language in MAR 6.3 and the import of that rule here. The absence of a request for a trial *de novo* precludes this Court's review of the final judgment.

IV. MOTION TO DISMISS KING'S APPEAL OF THE FINAL JUDGMENT[2]

This case involves arbitration under Chapter 7.06 RCW, which authorizes courts to impose mandatory arbitration of civil suits where the amount claimed is $50,000 or less. RCW 7.06.020(1); *Williams v. Tilaye*, 174 Wn.2d 57, 272 P.3d 235, 238 (2012). The purpose of authorizing mandatory arbitration in certain civil cases is to alleviate court congestion and reduce delay in hearing civil cases. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526, 79 P.3d 1154 (2003); *Dill v. Michelson Realty Co.*, 152 Wn. App. 815, 819, 219 P.3d 726 (2009). The procedures to implement the mandatory arbitration of civil actions are established in the MARs as adopted by our Supreme Court. RCW 7.06.030; *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

A party dissatisfied with a mandatory arbitration ruling may only obtain judicial review of that decision by timely requesting a trial *de novo*. *Malted Mousse*, 150 Wn.2d at 529; RCW 7.06.050. If no request for a trial *de novo* is made, the trial court may reduce the arbitration award to judgment:

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[2] A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. RAP 10.4(d).

> (1) Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.
>
> . . . .
>
> (2) *If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, a judgment shall be entered* and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions.

RCW 7.06.050 (emphasis and bold added).

MAR 6.3 expands upon the consequences of failing to request a trial *de novo*:

> Judgment. If within the 20-day period specified in rule 7.1(a) no party has properly sought a trial *de novo*, the prevailing party on notice as required by CR 54(f) *shall* present to the court *a judgment on the award of arbitration* for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it *is not subject to appellate review* and it may not be attacked or set aside except by a motion to vacate under CR 60.

(Boldface omitted; emphasis added.)

As the statutory scheme and the rules instruct, an arbitration award is not appealable. MAR 6.3. *See also, Cook v. Selland Constr., Inc.*, 81 Wn. App. 98, 912 P.2d 1088 (1996) (summarily dismissing an appeal filed by a defendant who failed to request a trial *de novo*, which was the only correct avenue for review of the adverse ruling). If the aggrieved party fails to seek a trial *de novo* within the deadline set forth in MAR 7.1(a), the prevailing party is entitled to entry of judgment on the award.[3] MAR 6.3. Restricting judicial review of arbitration awards promotes the legislative purposes of finalizing disputes, alleviating court congestion, and reducing delay. *Carpenter v. Elway*, 97 Wn. App. 977, 984, 988 P.2d 1009 (1999).

The decision in *Dill* is instructive. In *Dill*, the plaintiffs filed suit under the Residential Landlord-Tenant Act of 1973, Chapter 59.18 RCW, alleging the defendants unlawfully disposed of or destroyed their personal property. The plaintiffs sought damages in excess of $125,000, but agreed to waive any claim in excess of $50,000 for arbitration purposes. Following arbitration, the

[3] CR 54(e) provides that if the prevailing party fails to prepare and present the judgment within the prescribed time, any other party may do so upon notice of presentation as provided in CR 54(f)(2).

arbitrator awarded damages of $45,000, but in a separate award, awarded approximately $28,000 in attorney fees and costs.

The defendants did not request a trial *de novo*, but in moving for entry of judgment on the arbitration award asked the trial court to reduce the attorney fees so the total award would not exceed $50,000. The court entered judgment on the award, declining to reduce it as the defendants requested. This Court dismissed the appeal because the defendants "decided against a trial *de novo* and instead filed an appeal that the arbitration rules do not allow." *Dill*, 152 Wn. App. at 822.

Parties that fail to request a trial *de novo* may not alter an arbitration award by "requesting action by the Superior Court which would amend that award." *Trusley v. Statler*, 69 Wn. App. 462, 465, 849 P.2d 1234 (1993). In *Trusley*, the plaintiff sued the defendants for breach of contract. Following mandatory arbitration, the arbitrator dismissed the complaint but denied the defendants' request for attorney fees under RCW 4.84.185. When they moved for entry of judgment on the award, the defendants asked the trial court to award attorney fees based on the offer of settlement statute, RCW 4.84.250. The court awarded fees. On appeal, Division Three of this court concluded that since the defendants

failed to ask the arbitrator to award fees on the basis requested and then did not seek a trial *de novo*, they were "limited to judgment on the arbitrator's award." *Trusley*, 69 Wn. App. at 464. "Both parties, by not asking for a trial *de novo*, accepted the arbitrator's award and may not alter it by requesting action by the Superior Court which would amend that award." *Trusley*, 69 Wn. App. at 465.

Because King failed to request a trial *de novo*, the trial court here was required to enter judgment on the arbitration award. *Id.* It had no authority to do anything else. Having failed to seek review of the award by requesting a trial *de novo*, King is precluded from appealing the judgment entered on that award. Accordingly, this Court should dismiss King's appeal without addressing the substantive issue presented.

V. ARGUMENT IN RESPONSE AND IN SUPPORT OF AFFIRMANCE

A. Standards of Review

Although King correctly notes this Court reviews questions of law and conclusions of law *de novo*, she fails to address any other applicable standards of review. Br. of Appellant at 16.

The Court reviews a trial court's application of the mandatory arbitration rules *de novo*. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). Interpretation of a statute or a court rule

likewise presents a question of law the Court reviews *de novo*. *Nevers*, 133 Wn.2d at 809; *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

B. The Trial Court's Decision To Enter A Final Judgment On The Arbitration Award Was Proper

Even assuming review of the final judgment is appropriate, an assumption with which State Farm strongly disagrees, King fails to provide the Court with any basis to reverse the trial court's final judgment. The judgment was appropriate and required by law.

1. State Farm had standing and an interest in seeking entry of a final judgment

King urges this Court to reverse the trial court judgment claiming State Farm lacks standing to have the judgment entered because it does not have a distinct and personal interest in a judgment between King and McCarten. Br. of Appellant at 24-34. King's interpretation of standing is far too narrow. State Farm had standing to seek entry of the final judgment where it had a distinct and personal stake in that judgment.

The doctrine of standing generally prohibits a party from asserting another person's legal right. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805, 102 L. Ed.

2d 15, 109 S. Ct. 35 (1988); *Miller v. U.S. Bank*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994). A party has standing to raise an issue if it "has a distinct and personal interest in the outcome of the case." *Erection Co. v. Dep't of Labor & Indus.*, 65 Wn. App. 461, 467, 828 P.2d 657 (1992), *aff'd*, 121 Wn.2d 513, 852 P.2d 288 (1993). Stated another way, a party has standing if it demonstrates "a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted." *Primark, Inc. v. Burien Gardens Associates*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

Here, State Farm had standing to seek entry of the final judgment for a number of reasons. First, it was a party to King's lawsuit. CP 6-13. King named both McCarten and State Farm as defendants and unequivocally asserted that their liability was indivisible. CP 6, 8. She then transferred the case to mandatory arbitration, where she continued to argue McCarten and State Farm were jointly and severally liable for her damages. CP 40. The arbitrator disagreed and determined King's damages for the two separate accidents accordingly. CP 40.

Second, King did not object to State Farm's standing or its

participation in the arbitration until long *after* the arbitration had concluded. If she felt that State Farm lacked standing to participate, then she should have timely raised that issue with the arbitrator and sought to bifurcate it. She did not. More importantly, she benefited from State Farm's participation in the arbitration. Arbitrating two accidents simultaneously is certainly more cost effective and efficient than arbitrating them separately. Given that King benefited from State Farm's presence at and participation in the arbitration, the Court should not permit her to avoid the straight-forward application of a mandatory arbitration rule that applied equally to all of the parties engaged in that arbitration.

Third, State Farm had an active interest in the dispute between King and McCarten as King's UIM carrier. King's insurance policy specifically provided: "[w]e will pay compensatory damages for bodily injury an insured is legally entitled to recover from the owner or driver of an *underinsured* motor vehicle[.]" CP 118 (emphasis added). As King admits, the arbitrator awarded her $50,000 for her claim against McCarten based on the arbitration cap. That amount was therefore the total amount to which King was legally entitled from McCarten. It was also indisputably within McCarten's policy limits, which meant that McCarten was not

underinsured and that State Farm would thereafter be discharged from any obligation to pay UIM benefits. State Farm had standing to seek entry of a judgment consistent with that outcome and to preserve its rights as to any claim for UIM damages arising from King's collision with McCarten.

Finally, King's efforts to erode State Farm's standing are inconsistent with the MARs. State Farm enforced the arbitration award utilizing the arbitration rules that applied to all of the parties who participated in that arbitration.

2. State Farm's motion for entry of judgment did not violate Washington law

King also argues the trial court erred by entering the final judgment because State Farm's motion violates Washington law. Br. of Appellant at 34. According to King, State Farm engaged in bad faith conduct and unfair claims settlement practices in violation of Washington's Insurance Fair Conduct Act, Chapter 48.30 RCW, by forcing a judgment between King and McCarten in the absence of standing. Br. of Appellant at 26-32, 34-35. King's arguments are unavailing. State Farm did not engage in bad faith conduct when it sought to enter a judgment preserving its rights.

When King filed suit against State Farm and McCarten, she claimed that the injuries she suffered in the separate motor vehicle

accidents were indivisible. CP 8. State Farm and McCarten were thus jointly and severally liable for her damages. King later transferred the case to mandatory arbitration because "the sole relief being sought [was] a money judgment and involve[d] no claim in excess of fifty thousand dollars ($50,000), exclusive of attorney fees and costs." CP 62. She never asserted that her claims exceeded the arbitration cap or that she was waiving any claim in excess of that cap for purposes of arbitration. CP 62. *She instead affirmatively asserted her case involved no claim over $50,000*, which meant that her claim against McCarten could not result in UIM exposure to State Farm because that claim was within McCarten's policy limits.

Consistent with the jurisdictional limits for an arbitration award, the arbitrator issued an award against McCarten for $50,000 and an award against State Farm for $3,500. CP 37, 39-40, 43. As King grudgingly admits, State Farm paid more than the amount awarded by the arbitrator. Br. of Appellant at 7, 8. Only when State Farm sought to formally conclude the case did it learn that King intended to pursue a UIM claim against it despite application of the arbitration cap and the policy-limits award entered against McCarten. State Farm immediately demanded that King enter

judgment to preserve State Farm's rights as to the UIM claim arising from the McCarten accident and to hold King to the asserted value of her claim. King refused. State Farm was therefore compelled to reduce the arbitration award to judgment under MAR 6.3 to conclude the case.

King provides no authority to support her accusation that State Farm was prohibited from demanding entry of the judgment on the arbitration award. Her suggestion that State Farm was not entitled to have a final judgment entered is rather ironic, given that she refused to comply with the arbitration rules she invoked and that she left State Farm with no other avenue to formally conclude the case. State Farm's motion was consistent with and permitted by MAR 6.3.

MAR 6.3 provides that if no party has sought a trial *de novo* within 20 days after an arbitration award is filed, the prevailing party "shall" present to the trial court a judgment on the award of arbitration for entry as a final judgment. Use of the word "shall" indicates an imperative. *See, e.g., Roberts v. Johnson,* 137 Wn.2d 84, 90, 969 P.2d 446 (1999) (holding the word "shall" is to be read as a mandatory requirement in the context of the mandatory arbitration rules). Since no one requested a trial *de novo*, King was

required to present a judgment on the arbitration award. MAR 6.3. She refused to do so. State Farm's only remedy to conclude the case in light of King's self-interested refusal to comply with that rule was to move the trial court for entry of a final judgment under CR 54(e) or, alternatively, to compel King to present the judgment. State Farm's motion was consistent with MAR 6.3 in light of King's refusal to comply with her obligations under the MARs. State Farm did not engage in bad faith conduct when it sought to enter a judgment preserving its rights.

3. The trial court did not err by entering a satisfaction of judgment against McCarten

King next argues the trial court erred by entering a judgment against McCarten for which neither she nor McCarten bargained and by entering a satisfaction of judgment against McCarten when he had not fully satisfied the underlying arbitration award. Br. of Appellant at 36-38. She is mistaken.

Once again, King fails to understand that the trial court had no authority to do anything other than reduce the arbitration award to judgment when no one requested a trial *de novo*. *Trusley*, 69 Wn. App. at 465. The court could not enter anything other than a judgment against McCarten for $50,000 in damages and $2,156.95 in costs as provided in the arbitration award. *Id.* More to

the point, however, King's complaint has no bearing on her dispute with State Farm. Her frustration with McCarten's satisfaction of judgment is more appropriately directed at McCarten rather than at State Farm.

Finally, King's argument that the trial court erred when it considered the settlement agreement between King and McCarten for one purpose but not another is misplaced. Br. of Appellant at 36-37. Although the court could not consider the settlement agreement when asked to enter judgment on the arbitration award, it could consider the agreement when deciding whether McCarten had satisfied his financial obligations to King. As the court acknowledged, the settlement agreement allowed McCarten to satisfy the judgment even though the amount he paid pursuant to that agreement was less than the amount stated in the underlying judgment. RP 14, 17, 19. The trial court did not err when it entered a satisfaction of judgment against McCarten based on the parties' settlement agreement.

King has given the Court nothing but self-interested hyperbole in a misguided attempt to reverse the trial court's final judgment. It is not sufficient. The judgment was appropriate and required by law.

C. The Trial Court's Decision to Deny McCarten's Motion Was Proper

King also claims the trial court erred by refusing to grant McCarten's motion to dismiss her lawsuit against him because they had settled their dispute and stipulated to its dismissal following the arbitration, but before the time period to request a trial *de novo* had expired. Br. of Appellant at 17-18. According to King, she settled with McCarten to ensure he did not request a trial *de novo.* Br. of Appellant at 17. But whether King and McCarten settled, and the terms of that settlement, are immaterial. King was no longer entitled to dismiss her lawsuit as a matter of right once the arbitrator filed his award; consequently, the trial court did not err by refusing to grant McCarten's motion to dismiss.

Washington courts have long held that a plaintiff cannot non-suit a case without permission once the arbitrator has filed a decision. *Thomas-Kerr v. Brown*, 114 Wn. App. 544, 59 P.3d 120 (2002), is illustrative of that principle. There, the defendant requested a trial *de novo* after mandatory arbitration and then sought to withdraw the request. The plaintiff objected to the withdrawal and, alternatively, moved for a voluntary nonsuit under CR 41(a). Division One of this court affirmed the trial court's denial of the plaintiff's motion:

> [W]hile a case is assigned to an arbitrator, the plaintiff has the ability to withdraw under CR (41)(a). However, once the arbitrator makes an award, the plaintiff no longer has the right to withdraw without permission. This interpretation is consistent with the rule's purpose and plain language. Thus, we reject Thomas-Kerr's alternative argument that she should have been permitted to take a voluntary nonsuit under CR 41(a) when Brown decided to withdraw his request for trial *de novo*.
>
> Although the MAR provide limited relief from a judgment following an arbitration award, CR 41(a) cannot be used to circumvent the arbitration statute and the finality of judgments. Once the arbitrator presents an award to the court, the parties have 20 days to appeal the decision. If no one appeals in the 20-day period, MAR 6.3 *requires* the court to enter a judgment. MAR 6.3 does not allow a plaintiff to nonsuit a case following a decision by the arbitrator.

Id. at 562-63 (citations omitted; emphasis added).

Because King cannot stipulate to the dismissal of her claims as a matter of right to escape an arbitration award, it follows that neither can McCarten. Both parties participated in the arbitration process and should be bound by its results. King's attempt to avoid application of CR 41(a) lacks merit.

D. King Is Not Entitled To Attorney Fees Even If She Prevails On Appeal

Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees even if he or she prevails on appeal. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

King did not request an award of attorney fees on appeal in her opening brief. Br. of Appellants at ii-iv. Any attempt to correct that oversight by requesting attorney fees in reply would come far too late. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting an issue raised and argued for the first time in a reply brief comes too late to warrant consideration); *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (noting the appellate courts do not consider issues raised for the first time in a reply brief). Accordingly, King is not entitled to an award of attorney fees on appeal even if she prevails.

VI. CONCLUSION

No party sought a trial *de novo* following entry of the arbitration award. Because the judgment entered on the arbitration award is not appealable, this Court must dismiss King's appeal from

that order. MAR 6.3. But even assuming review of the final judgment is appropriate, King fails to provide the Court with any sustainable basis to reverse the trial court's final judgment. The judgment was appropriate and *required* by law.

This Court should affirm the trial court in all respects and award costs on appeal to State Farm pursuant to RAP 14.2.

DATED this 22nd day of April, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares and states that on the date listed below I deposited with the U.S. Postal Service, postage prepaid, a true and accurate copy of the Brief of Respondent State Farm Mutual Automobile Ins. Co. for service on the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 22nd day of April, 2015 at Seattle, Washington.

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